STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of NICHOLAS LEE BARNES,
Minor.

PEOPLE OF THE STATE OF MICHIGAN

Petitioner-Appellee,

v

NICHOLAS LEE BARNES,

Respondent-Appellant.

UNPUBLISHED
August 28, 2007

No. 269384
Kalamazoo Circuit Court
Family Division
LC No. 05-000273-DL

Before: Smolenski, P.J., and Fitzgerald and Kelly, J.J.

KELLY, J. *(dissenting).*

I respectfully dissent. The trial court did not abuse its discretion in denying respondent's motion to withdraw his plea of admission and counsel was not ineffective. I would affirm.

I. Basic Facts

Respondent was charged with three counts of second-degree criminal sexual conduct (CSC), MCL 750.520c(1)(a), for engaging in sexual contact with a girl under the age of 13. The victim, a six-year-old girl, reported that she sat facing respondent with her legs straddled over respondent's lap and that while she was so positioned, respondent would move his hips up and down. She also reported that on one occasion, respondent reached inside his pants and made hand motions suggesting that he was masturbating. In his statement to police, respondent admitted that the victim, on more than one occasion, would sit on his lap and that he was sexually aroused. He further conceded that on one occasion, he reached into his pants to "adjust himself."

At the pretrial hearing, respondent entered a plea to an added count of fourth-degree CSC, MCL 750.520e(1), and the other charges were dismissed. Respondent and his mother both acknowledged that they understood the charges and plea agreement. Respondent was advised of his rights and stated that he understood them. Both he and his mother stated that the plea was not induced by any promises or threats. Further, his mother stated that she had no objection to respondent entering the plea. Respondent also admitted that he had the child sit on his lap for the purpose of sexual arousal. The court accepted the plea.

At the dispositional hearing, respondent was represented by different counsel who filed a motion to withdraw the plea. Respondent asserted that he was innocent and told his attorney he was innocent, but the attorney advised him to enter a plea to a reduced charge "to avoid the threat of incarceration [in] a long term detention center." In addition, respondent and his mother felt that they did not have "sufficient time to meet with an attorney and review the police reports and prepare a defense to this case."

The court denied the motion stating:

> The mother maintains she attempted to contact Attorney Powers prior to the pretrial to no avail. On the day of the pretrial, the mother maintains that she and the juvenile felt rushed and had not had enough time to prepare a defense. Yet, the juvenile and parent were apprised of the charges in the spring of 2005. In addition, at the pretrial on September 23, 2005, 1-½ hours of negotiations and discussions had occurred prior to the court being informed there was a plea. The mother maintains the juvenile pled under the duress of a threat of detention. It appears to the court that the information that was perceived by the juvenile and parent as a threat was actually an accurate representation by counsel of the possible interim dispositional or dispositional recommendations. In addition, the mother testified that Attorney Powers informed the juvenile and parent that if the matter proceeded to trial, it would be as to the 3 CSC 2nd charges. This was also an accurate representation of the procedural process.
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> The juvenile was provided with ample opportunity to discuss the matter with counsel for 1-½ hours at the pretrial. The juvenile was repeatedly asked on the record if he understood the process. The mother and juvenile stated that there were no threats or promises involved in the plea. Yet, two months later a request to withdraw the plea is made. If the juvenile and parent were not satisfied with counsel, they could have requested an adjournment, requested other counsel, requested more time etc. At no time was the court informed that the matter was proceeding too quickly for the juvenile and parent to make decisions.

II. Applicable Law and Standards of Review

A guilty plea must be understanding, voluntary, and accurate. MCR 3.941(C). It is understanding if the respondent is advised of and understands the rights set forth in MCR 3.941(C)(1). It is voluntary if the terms of the plea agreement are disclosed and the plea is the respondent's own choice, i.e., it is not tendered under threat or duress. MCR 3.941(C)(2). It is accurate if the respondent admits facts to support a finding that he committed the offense charged. MCR 3.941(C)(3). In the absence of a procedural error in receiving the plea, a defendant must establish a fair and just reason for withdrawal of the plea. *People v Lamar Harris*, 224 Mich App 130, 131; 568 NW2d 149 (1997). After a plea of admission has been accepted, the plea may be withdrawn in the court's discretion. MCR 3.941(D). A motion to withdraw a plea is reviewed for an abuse of discretion resulting in a miscarriage of justice. *People v Davidovich*, 238 Mich App 422, 425; 606 NW2d 387 (1999).

"To establish ineffective assistance of counsel, a defendant must prove that his counsel's performance was deficient and that, under an objective standard of reasonableness, [he] was

denied his Sixth Amendment right to counsel." *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). A defendant must also prove that his counsel's deficient performance was prejudicial to the extent that, but for counsel's error, the result of the proceedings would have been different. *Id.* "Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise." *Id.* Unless a defendant claiming ineffective assistance of counsel moves for a new trial or an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), this Court's review is limited to mistakes apparent on the record, *People v Barclay*, 208 Mich App 6780, 672; 528 NW2d 842 (1995).

III. Plea Procedure

There was no procedural error in the taking of the plea. To the contrary, respondent was advised of all the rights required by MCR 3.941(C)(1). He affirmed that there were no promises to induce the plea other than the reduction of the charges to fourth-degree CSC and that he had not been threatened. A party is to be held to his record denial. *People v Weir*, 111 Mich App 360, 361; 314 NW2d 621 (1981). Respondent's mother stated that she did not know of any threats or promises made to induce the plea and knew of no reason why the plea should not be accepted. Respondent admitted that he had contact with the victim, who sat on his lap, and that he engaged in that contact for the purpose of sexual arousal. The trial court did not abuse its discretion in denying respondent's motion.

IV. Effective Assistance of Counsel

First, I believe this issue is not properly presented for review because respondent has failed to brief the merits of his claim. *People v Isaiah Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004). He asserts generally that trial counsel failed to investigate the charges, to consult with him, ignored his claim of innocence, and misinformed him of the consequences of his plea. However, the only facts actually discussed in respondent's brief on appeal relate to a "Mr. Pelikan," who claimed to be innocent, said that his attorney told him that the court "was gonna hang me if I didn't take the plea," and that "he had not had the proper assistance of counsel in challenging the search and seizure in this case." The record is totally silent with respect to who "Mr. Pelikan" is or what possible relevance he has to this case. Moreover, respondent offers no support for his claim of innocence. Respondent's failure to properly address the merits of his assertion of error constitutes abandonment of the issue. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).

Second, respondent's motion itself did not establish a right to relief. Respondent asserted that counsel recommended that he accept the plea bargain "to avoid the threat of incarceration to a long term detention facility." According to respondent's mother, counsel told respondent that if he proceed to trial, he would be facing the original charges of second-degree CSC and that, upon a finding of responsibility, respondent would be sentenced to juvenile detention. There is nothing improper about such advice. Respondent also asserted that he did not have sufficient time to meet with counsel, review the police reports, and prepare a defense. However, he was only in court for a pretrial hearing. If he wanted to proceed to trial, he did not have to enter a plea; the case would have been set for trial and he could discuss defenses and trial strategy with counsel before the trial date. Alternatively, respondent could have requested additional time to consider the plea offer. He did not have to make an immediate election between a plea and a trial, and there is nothing to suggest that the offer was of limited duration.

Finally, contrary to the majority's conclusion that "counsel failed to consider and discuss possible defenses to the charges if respondent did opt to go to trial," I would conclude that counsel's representation to respondent that there was no defense to the charges points to just the opposite – that defenses were discussed. In light of the potential evidence against respondent, the forensic interview of the victim as well as respondent's statement to police, counsel's advice to accept the plea because "that was the best [counsel] could do" and "there's not [a] defense here" was legitimate. Respondent was charged with three fifteen-year felonies. If convicted, he faced long term detention and lifetime registration on the sex-offenders list. Counsel was able to negotiate a plea to a single two-year high misdemeanor and, while lengthy, a shorter period of registration. Respondent was placed on moderate probation in the home of his mother and was discharged approximately six months after disposition. In my opinion, respondent has failed to show that counsel's performance was objectively unreasonable in light of prevailing professional norms and that, but for the attorney's error or errors, a different outcome reasonably would have resulted. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

I would affirm.

/s/ Kirsten Frank Kelly